SUPREME COURT, U.S.
FILED
FEB 5 - 2010

No. 09-784

IN THE
Supreme Court of the United States

JANICE C. AMARA ET AL., individually and on behalf of all others similarly situated,

Petitioners,

v.

CIGNA CORPORATION AND CIGNA PENSION PLAN,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION FOR CIGNA CORPORATION AND CIGNA PENSION PLAN

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QUESTIONS PRESENTED

1. Whether the district court abused its remedial discretion under ERISA when it granted certain relief for a violation of ERISA's § 204(h) notice requirement, but denied other relief that would have required the court to invalidate a plan amendment that "[p]laintiffs have never challenged."

2. Whether the district court abused its remedial discretion under ERISA when it granted certain relief for a violation of ERISA's Summary of Material Modifications notice requirement, but denied other relief that would have required the court "entirely to rewrite the Plan's provisions" and that plaintiffs "concede[d]" the court lacked the authority to implement.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel state that CIGNA Corporation has no parent corporation and that no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION FOR CIGNA CORPORATION AND CIGNA PENSION PLAN

Respondents CIGNA Corporation and CIGNA Pension Plan (collectively, "CIGNA") respectfully submit this brief in opposition to the petition for a writ of certiorari filed by plaintiffs Janice C. Amara et al.

OPINIONS BELOW

The opinion of the court of appeals is unpublished but is electronically reported at 2009 WL 3199061. Pet. App. 1a. The opinions of the district court are published at 559 F. Supp. 2d 192 (Pet. App. 4a) and 534 F. Supp. 2d 288 (Pet. App. 76a).

JURISDICTION

The court of appeals filed its opinion on October 6, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The fact-bound and inadequately preserved questions presented do not warrant either plenary review or a GVR.

Plaintiffs failed to preserve either of their questions presented for this Court's review. Moreover, even if they had done so, plenary review would still be inappropriate because plaintiffs do not suggest that, as to the questions they raise, the decision below conflicts with decisions from other circuits, contravenes the precedent of this Court, or otherwise involves a question of exceptional importance. In contrast, CIGNA has submitted a petition for a writ of certiorari (No. 09-804) on a question that has gen-

erated a direct and acknowledged circuit split and that has profound importance for both plan participants and plan sponsors. Similarly, a GVR for further consideration of plaintiffs' questions presented in light of *Conkright v. Frommert*, No. 08-810, would be inappropriate because those questions are unrelated to the issues before the Court in *Frommert* and thus nothing in the Court's disposition of that case could alter the lower courts' resolution of those questions.

The petition for a writ of certiorari should be denied.

1. CIGNA sponsors a pension benefit plan for its employees that is governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* In 1998, CIGNA transitioned from a traditional defined benefit pension plan, known as "Part A," to a cash balance pension plan, known as "Part B." Pet. App. 88a-89a. As detailed at greater length in CIGNA's petition for a writ of certiorari, in 2001, plaintiffs filed suit against CIGNA in the United States District Court for the District of Connecticut under ERISA § 502, 29 U.S.C. § 1132. On behalf of a putative class of participants in the CIGNA Pension Plan, plaintiffs alleged that Part B of the Plan violated numerous substantive requirements of ERISA and that CIGNA had violated certain of ERISA's disclosure requirements during the transition from its defined benefit pension plan to its cash balance plan. Pet. App. 78a.

The district court certified a class of approximately 26,000 plan participants. Pet. App. 117a. After a bench trial, the court concluded that the terms of CIGNA's cash balance plan were lawful. *Id.* at 79a. It also concluded, however, that the information

CIGNA provided plan participants about the transition to the cash balance plan was inadequate and did not satisfy three of ERISA's statutory disclosure requirements. *Id.* at 80a.

Specifically, the court found that the CIGNA Plan's Summary Plan Descriptions ("SPDs") were deficient because they failed to disclose to participants a phenomenon known as "wear away"—which meant that some participants might have account balances that are less valuable than their Part A minimum benefit for some period of time due to falling interest rates and other factors. Pet. App. 204a. The court also found that CIGNA failed to comply with the provisions of ERISA § 204(h), 29 U.S.C. § 1054(h)(1), which requires a plan to inform participants whenever their future benefit accruals are likely to be significantly reduced. Pet. App. 195a. Finally, the court found that several statements in the CIGNA Plan's Summary of Material Modifications ("SMM") were misleading because they suggested that the cash balance plan would provide "comparable" benefits to the Part A plan. *Id.* at 112a.

2. After ordering additional briefing, the district court issued a further opinion that addressed the remedies for each of these disclosure violations. Pet. App. 4a.

For the SPD violations, the district court ordered CIGNA to recalculate the class's benefits using a so-called "A+B" approach that provides for a participant to receive "all of her Part A benefits in the form those benefits were previously offered under Part A, plus all the benefits she accrued under Part B." Pet. App. 45a. The court awarded plaintiffs that relief without requiring *any* class member to demonstrate that she

had read, much less relied on, the allegedly deficient SPDs. *Id.* at 9a.

To remedy the deficiency in the § 204(h) notice, the district court ordered CIGNA to distribute an additional § 204(h) notice that fully informed the plan participants about the details of the transition to the cash-balance plan. Pet. App. 42a. In so doing, the court rejected plaintiffs' proffered remedy—the invalidation of the amendment implementing the cash balance plan and a return to Part A benefits. *Id.* at 32a. The court concluded, "in an exercise of its equitable powers, that a return to Part A is not an appropriate remedy for CIGNA's deficient § 204(h) notice under the peculiar factual circumstances presented here" because "a widespread return to Part A would . . . be extremely costly" for CIGNA and because "the terms of Part B themselves are legally valid under ERISA and CIGNA provided substantial accurate information to its employees." *Id.* at 38a, 39a. The court also emphasized that the transition to the cash balance plan had been preceded by a separate, validly enacted plan amendment that froze benefit accruals under the Part A formula, which was necessary to afford CIGNA a stable benefits environment in which to finalize the transition and which plaintiffs had "never challenged." *Id.* at 35a. The "invalidation" of the amendment establishing the cash balance plan, the court concluded, would therefore "harm, rather than benefit, Plaintiffs" because it would reinstate the benefits freeze. *Id.* at 39a.

Finally, the district court declined to award the plaintiffs additional relief based on the statements in the CIGNA Plan's SMM indicating that benefits under the cash balance plan would be "comparable" to those under Part A. Pet. App. 50a. The court ex-

plained that, "[i]n order to make these statements 'true,' as Plaintiffs request, the Court would be required entirely to rewrite the Plan's provisions, with no clear guidance from the Plan itself or the relevant notices and disclosures." *Id.* The court emphasized that plaintiffs had "concede[d] that the Court does not have such authority" and that it "wholeheartedly agree[d]" with that concession. *Id.* at 50a-51a.

The Second Circuit summarily affirmed the district court's decision. Pet. App. 3a.

REASONS FOR DENYING THE PETITION

1. THE QUESTIONS PRESENTED DO NOT WARRANT PLENARY REVIEW.

Plaintiffs failed to preserve either question presented for this Court's review. Moreover, they make no attempt to satisfy any of the traditional criteria that govern this Court's exercise of its certiorari jurisdiction. Indeed, they do not even assert that, as to the questions presented in their petition, the decision below conflicts with the decisions of other circuits, contravenes the precedent of this Court, or presents a question that has importance beyond the specific factual setting of this case. Accordingly, to the extent that plaintiffs' petition includes a request for plenary review within its opaque request for relief—which asks the Court to hold the petition pending *Frommert* and then to "dispose[ ] of [the case] accordingly" (Pet. 31)—the petition should be denied.

A. Each of plaintiffs' questions presented implicates the district court's application of its broad remedial discretion under ERISA to the unique facts of this case.

First, plaintiffs challenge the district court's determination not to reinstate, on a going-forward ba-

sis, their Part A benefit formula as a remedy for CIGNA's violation of the ERISA § 204(h) notice requirement. Plaintiffs formulate their first question presented as whether the district court "err[ed] in concluding that it lacks the authority to require the prior benefit provisions to be reinstated." Pet. i. But the district court never held that it lacked the "authority" to order the relief requested by plaintiffs. Rather, it "determined, in an exercise of its equitable powers, that a return to Part A is not an appropriate remedy." Pet. App. 39a. In reaching this discretionary determination, the district court emphasized not only that the imposition of such a costly remedy was unwarranted under the facts of this case (*id.* at 38a), but also that a return to the Part A benefit formula would have required the court to invalidate the separate plan amendment that froze benefit accruals preceding the transition to the cash balance plan—an amendment that plaintiffs *never* challenged as unlawful. *See id.* at 35a ("Plaintiffs have never challenged the validity of [the freeze amendment]."). Plaintiffs therefore do not present a generally applicable—or adequately preserved—legal question regarding district courts' remedial authority under ERISA. They are instead urging this Court to review the district court's fact-bound discretionary determination that, under the "unusual, if not unique, circumstances" of this case, the remedy sought by plaintiffs was not appropriate due to the costs involved and the unchallenged pension freeze amendment that preceded the transition to the cash balance plan. *Id.* at 34a.

Second, plaintiffs challenge the district court's decision not to provide additional benefits to the plan participants as a remedy for statements in the CIGNA Plan's SMM suggesting that the cash bal-

ance plan would provide "comparable" benefits to Part A. Any conceivable basis for deeming that question cert-worthy is eviscerated by "Plaintiffs['] conce[ssion]" that the district court did "not have" the "authority" "to rewrite the Plan's provisions," which would have been necessary to afford plaintiffs "comparable" benefits to the ones they would have received under Part A. *Id.* at 50a-51a. Moreover, as with their first question presented, plaintiffs do not contend that this aspect of the district court's decision conflicts with the decisions of this Court or any other court. The total absence of conflicting authority on this issue is, standing alone, a more than adequate reason to deny review.

2. The absence of any remotely persuasive reason to grant plenary review of plaintiffs' questions presented is especially apparent when those narrow, fact-intensive questions are contrasted with the jurisprudentially significant—and sharply disputed—question presented in CIGNA's petition for a writ of certiorari.

That petition asks the Court to resolve the direct and acknowledged circuit split regarding the showing that a plaintiff must make to recover benefits based on a deficient SPD. Six circuits—the First, Fourth, Seventh, Eighth, Tenth, and Eleventh—apply a reliance-or-prejudice standard that requires plaintiffs to demonstrate "significant reliance upon, or possible prejudice flowing from, the faulty plan description." *Govoni v. Bricklayers, Masons & Plasterers Int'l Union of Am., Local No. 5 Pension Fund*, 732 F.2d 250, 252 (1st Cir. 1984) (Breyer, J.); *see also, e.g., Aiken v. Policy Mgmt. Sys. Corp.*, 13 F.3d 138, 141 (4th Cir. 1993); *Greeley v. Fairview Health Servs.*, 479 F.3d 612, 614 (8th Cir. 2007). The Third, Fifth, and Sixth Circuits, however, permit plaintiffs

to recover without any showing of reliance or prejudice—or even a showing that they ever read the plan. *See, e.g.*, *Burstein v. Ret. Account Plan for Employees of Allegheny Health Educ. & Research Found.*, 334 F.3d 365, 381 (3d Cir. 2003); *Washington v. Murphy Oil USA Inc.*, 497 F.3d 453, 458-59 (5th Cir. 2007). And, among the deeply divided circuits, the Second Circuit stands alone in applying a "likely harm" standard that permits plaintiffs to recover whenever they can show that they were likely harmed by a deficiency in the SPD and the employer is unable to prove harmless error. *See Burke v. Kodak Ret. Income Plan*, 336 F.3d 103, 112 (2d Cir. 2003), *cert. denied*, 540 U.S. 1105 (2004).

CIGNA's petition provides the Court with a sound vehicle for resolving a widespread and entrenched conflict on an issue that has significant implications for both plan sponsors and plan participants. Plaintiffs' petition, in contrast, presents fact-bound and unpreserved questions that have little jurisprudential relevance outside the "unique[] circumstances" of this case.

II. THE QUESTIONS PRESENTED DO NOT WARRANT A GVR.

Plaintiffs' request for a GVR in light of *Frommert* is equally flawed because neither of the questions presented in their petition is remotely at issue in *Frommert*.

There are two questions before the Court in *Frommert*:

> (1) Whether the Second Circuit erred in holding, in conflict with decisions of this Court and other Circuits, that a district court has no obligation to defer to an ERISA plan administrator's reasonable interpreta-

> tion of the terms of the plan if the plan administrator arrived at its interpretation outside the context of an administrative claim for benefits.
>
> (2) Whether the Second Circuit erred in holding, in conflict with decisions of other Circuits, that a district court has "allowable discretion" to adopt any "reasonable" interpretation of the terms of an ERISA plan when the plan interpretation issue arises in the course of calculating additional benefits due under the plan as a result of an ERISA violation.

Pet. for Writ of Cert. at i, *Frommert* (No. 08-810).

Those issues are unrelated to the two questions presented by plaintiffs here: (1) whether the district court abused its remedial discretion under ERISA when it concluded, on the specific facts of this case, that the reinstatement of plaintiffs' Part A benefits was not an appropriate remedy for a violation of ERISA's § 204(h) notice requirement; and (2) whether the district court abused its remedial discretion under ERISA when it declined to remedy a violation of ERISA's SMM requirements by "rewrit[ing] the Plan's provisions" to provide plaintiffs with "comparable" benefits. Pet. App. 50a.

The first question presented in *Frommert*—regarding the deference due to a plan administrator's interpretation of a plan made outside the benefits-determination setting—has absolutely no connection to plaintiffs' questions presented. Plaintiffs do not contend in either of those questions (or in the body of their petition) that the courts below afforded undue deference to the remedial interpretations offered by CIGNA, the "de facto" administrator of the Plan.

Pet. App. 166a. In fact, both courts *rejected* CIGNA's proposed remedies. *Id.* at 3a, 46a.

The second question presented in *Frommert*—regarding the scope of a district court's "allowable discretion" to remedy ERISA violations—is equally irrelevant. The Second Circuit's decision in *Frommert* was issued more than a year *before* the Second Circuit's summary affirmance in this case. The Second Circuit therefore reviewed the relief that plaintiffs are challenging in their petition as too *restrictive* under the same "allowable discretion" standard that the Second Circuit applied in *Frommert* and that is being challenged by the petitioners in that case as too *permissive*. Accordingly, this Court's decision on *Frommert*'s second question presented will establish either that the Second Circuit reviewed the district court's remedial order in this case under the correct standard (as the respondents in *Frommert* are arguing) or that it afforded the district court too *much* discretion (as the petitioners in *Frommert* are arguing). No party in *Frommert*, however, is contending (as plaintiffs do here) that the Second Circuit has been applying an "allowable discretion" standard that places too many restrictions on district courts' remedial authority. (Indeed, in their *amicus* brief in *Frommert*, plaintiffs *defend* the Second Circuit's reasoning and urge affirmance of its application of the "allowable discretion" standard. *See Amici* Br. of Janice C. Amara et al. at 30, *Frommert* (No. 08-810)).

Thus, even if plaintiffs had adequately preserved the questions on which they seek review—which, as discussed above, they did not—a GVR for further consideration of those issues would be inappropriate because *Frommert* will have no bearing whatsoever on the lower courts' resolution of those questions. In contrast, the issue identified in CIGNA's GVR re-

quest—the district court's failure to afford adequate discretion to CIGNA's remedial interpretation of the Plan offered in its capacity as "de facto" plan administrator—is squarely implicated by *Frommert*'s first question presented. Because the Court's resolution of that issue could undermine significant aspects of the district court's remedial analysis in this case, if the Court does not grant plenary review of the question presented in CIGNA's petition, it should deny plaintiffs' petition and GVR CIGNA's petition for further consideration of that issue in light of *Frommert*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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